

In a brief news release on January 5, 2018, the DOL announced that, to determine whether interns are employees under the FLSA, it will henceforth conform to the “primary beneficiary” test first adopted by the U.S. Court of Appeals for the Second Circuit in its 2015 ruling in *Glatt v. Fox Searchlight Pictures Inc.*, 811 F.3d 528 (2d Cir. 2015). The Second Circuit held that a “primary beneficiary” test should be used to distinguish employees from interns under the FLSA. That test requires courts to analyze the “economic reality” of the intern’s relationship with his or her employer to evaluate whether the internship is primarily for the economic benefit of the employer or primarily for the educational benefit of the intern. If the employer is the primary beneficiary, the intern must be compensated as an employee under at least the minimum wage provisions of the FLSA. If the intern primarily benefits from the relationship, the internship can be unpaid.

The primary beneficiary test is a “flexible test” with seven non-exhaustive factors:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern’s formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern’s academic commitments by corresponding to the academic calendar.
5. The extent to which the internship’s duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern’s work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

No single factor is determinative. As noted in the DOL’s updated “Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act” (<https://www.dol.gov/whd/regs/compliance/whdfs71.htm>), “whether an intern or student is an employee under the FLSA necessarily depends on the unique circumstances of each case.”

Fact Sheet - United States Department of Labor

www.dol.gov

US Department of Labor: WHD's mission is to enhance the welfare and protect the rights of American workers by enforcing employment laws.
